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MICHAEL RODAK, JR.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-6316

ANDREW C. GOOSBY, *et al.*,
Petitioners,

v.

MAURICE OSSER, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Petitioners herewith make the following Reply to the Brief for Municipal Respondents filed in this matter.

I. THE ISSUE OF ABSTENTION IS NOT BEFORE THIS COURT

Municipal Respondents' chief contention is that petitioners' complaint was properly dismissed because the District Court should have abstained from hearing

petitioners' case. Respondents' argument is, however, inappropriately made because the issue of abstention is not before this Court. This is so for two reasons.

First, abstention is not in issue until the jurisdictional issues of the case are resolved. In order to reach the issue of abstention, it must be found in the first instance that a federal court has jurisdiction to hear the case. This preliminary resolution of the jurisdictional issue is important because where a federal court abstains it retains jurisdiction and does not dismiss the case. In the case at bar, the question of abstention was not before either the District Court or the Court of Appeals, nor was it reached or even raised by those Courts. The District Court dismissed petitioners' complaint for lack of jurisdiction and the Court of Appeals affirmed the dismissal on the ground that petitioners' case failed to present substantial constitutional issues. Since both Courts found that petitioners' case did not meet even the threshhold jurisdictional requirements, abstention is clearly not in issue until the jurisdictional issue is resolved before this Court.

Second, it is clear under *Idlewild Liquor Corp. v. Epstein*, 370 U.S. 713 (1962) that, in cases where application has been made for a three-judge court, the issue of abstention is not properly raised until the application for a three-judge court is decided. In *Idlewild*, the Court held that in three-judge court cases it was improper for a single judge to abstain and that the question of abstention was only for the three-judge court. Thus, in the case at bar, until the three-judge court issue is decided by this Court, abstention is not in issue.

For the foregoing reasons, therefore, it is apparent that the jurisdictional and three-judge court issues are the only

issues before the Court and these issues must be resolved before abstention may be raised in this case. Should the Court reverse the Court of Appeals and remand the case, the issue of abstention may be raised by Respondents below.

II. THE SUBSTANTIVE CONSTITUTIONAL CHALLENGE OF PETITIONERS' COMPLAINT IS NOT WHOLLY INSUBSTANTIAL

Municipal Respondents contend that petitioners' case involves merely a request for absentee ballot privileges and is, therefore, identical with the *McDonald* case. Respondents ignore, however, the allegations of petitioners' complaint and the entire thrust of petitioners' Brief that they not only sought to vote by absentee ballot but also in person by various means. Respondents candidly admit that the laws of the Commonwealth prohibit petitioners from voting by absentee means, and do not deny that petitioners' numerous attempts to vote in person were refused both by the Commonwealth and Municipal Respondents. Thus, for this reason and others, which are set forth more fully in the Brief for the Petitioners at pp. 12-25, the case at bar is clearly distinguishable from *McDonald*.

In addition, it should be noted that in a case identical to the petitioners' case brought just last month in the Northern District of Ohio, not only was a three-judge Court convened but the Court ruled in favor of the pre-trial detainees and ordered that paper ballots be provided to them. *Love v. Hughes*, No. C-72-1081, Memorandum Opinion and Order filed October 27, 1972.

III. PETITIONERS' CASE DOES CONSTITUTE A CASE OR CONTROVERSY WITHIN THE MEANING OF ARTICLE III OF THE UNITED STATES CONSTITUTION

Municipal Respondents' contend that the District Court properly found that petitioners' case does not constitute a case or controversy because the Attorney General of Pennsylvania has failed to issue a formal Opinion on the matter. Quite to the contrary, however, it is the Attorney General's actions, both in failing to issue any Opinion and in refusing petitioners' numerous requests to permit petitioners to register and vote, that results in the absolute denial of petitioners' right to vote. Moreover, even if such an Opinion were issued, the Municipal Respondents have stated that the Opinion is not binding on them and that they may administer the election laws independently of the Attorney General. As noted in the Brief for the Petitioners, at page 32, the absence of an Attorney General's Opinion does not make petitioners' plight any less of a deprivation of constitutional rights.

IV. CONCLUSION

For the reasons set forth herein and for the reasons set forth in the Brief for the Petitioners, the judgment, opinion and order of the Court of Appeals should be reversed and the case remanded to that Court with instructions to remand to the District Court for the empanelling of a three-judge Court.

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